

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs July 10, 2007

STATE OF TENNESSEE v. TERREL EUGENE HARRIS

Direct Appeal from the Criminal Court for Davidson County
No. 2005-B-1315 Mark J. Fishburn, Judge

No. M2006-02307-CCA-R3-CD - Filed October 30, 2007

The appellant, Terrel Eugene Harris, was convicted by a jury in the Davidson County Criminal Court of aggravated assault, reckless endangerment, and vandalism in an amount greater than \$500. He received a total effective sentence of ten years in the Tennessee Department of Correction. On appeal, the appellant challenges the trial court's decision to admit evidence regarding the appellant's prior abuse of the victim and its refusal to admit evidence regarding the victim's prior abuse of a witness. The appellant also argues that he "was denied his constitutional right to a fair trial since this case was improperly labeled as a domestic violence case which benefitted the State on crucial evidentiary issues." Upon our review of the record and the parties' briefs, we conclude that the appellant did not timely file his motion for new trial and as such waived his issues. Therefore, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court are Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which DAVID G. HAYES and THOMAS T. WOODALL, JJ., joined.

Mark Lane, Franklin, Tennessee, for the appellant, Terrel Eugene Harris.

Robert E. Cooper, Jr., Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Sarah Davis, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

The proof adduced at trial revealed that the appellant and Angela Leigh Harris began dating in July 2003, but they were never married. In 2004, the appellant and Harris argued about money, and during the argument, the appellant beat Harris, injuring her. Harris began "looking for a way out."

On March 9, 2005, Harris had to be in court on an unrelated matter, and she informed the appellant that she would not be returning to the residence they shared. Harris asked Ricky Leon Peoples, a friend and the father of two of her children, to drive her to the appellant's apartment so she could retrieve her belongings after the court proceeding. At 4:30 or 5:00 p.m., while on the way to the apartment, Peoples and Harris stopped at a small tobacco store to purchase cigarettes. Upon seeing them at the store, the appellant drove into the parking lot and parked his black 1994 Infiniti next to Peoples' 1992 Taurus. The appellant got out of his vehicle, approached the front passenger side of Peoples' vehicle where Harris was seated, and demanded that Harris exit the vehicle. Harris rolled up her window and locked her door. The appellant tried to pry Harris' door open. While attempting to open the door, the appellant was partially on the hood of the vehicle and bent Peoples' antenna. Harris instructed Peoples to drive away, and Peoples complied. As they drove away, they saw the appellant get back into his vehicle and begin following them. The appellant told Ricky Avinger, a passenger in his vehicle, "Man, I'm fixin' to get this bitch."

Soon thereafter, Peoples and Harris stopped at a red light. The appellant's vehicle struck the back of Peoples' vehicle, pushing it into traffic. Peoples drove away, and the appellant pursued at a high rate of speed. Harris, despite being "hysterical," called 911 to report the incident. Peoples was forced to stop at another red light, and the appellant again struck the back of the vehicle, using more force than the first time. The impact tore the bumper from Peoples' vehicle and once again forced the vehicle into traffic. Peoples recalled, "There's a center lane right [there] and there was a 18-wheeler truck in the center lane, if I had not gotten out of the path, it definitely would have hit our vehicle." Peoples, after evading a collision with the truck, drove away, attempting to evade the appellant. The appellant pursued Peoples' vehicle until the tires on the appellant's vehicle blew out, and he crashed into a fence.

Based upon the foregoing evidence, the jury found the appellant guilty of the aggravated assault of Harris, the reckless endangerment of Peoples, and the vandalism of Peoples' vehicle in an amount greater than \$500. The appellant, a Range II multiple offender, received a total effective sentence of ten years. On appeal, the appellant argues that the trial court erred by admitting evidence of the appellant's prior abuse of Harris, the court erred by refusing to admit evidence of Harris' prior abuse of Peoples, and the trial court erroneously labeled the case as a domestic violence case which benefitted the State on crucial evidentiary issues. Therefore, the appellant contends that he was denied his constitutional right to a fair trial.

II. Analysis

Initially, the State contends that the appellant's motion for new trial was untimely filed; thereby, the appellant's issues are waived. To determine our jurisdiction to entertain the appellant's issues, we must first review the timeliness of the appellant's motion for new trial.

The record reveals that the trial court entered the judgment of conviction on August 2, 2006; however, the appellant did not file a motion for new trial until September 8, 2006, more than thirty days after sentencing. A motion for new trial must be made in writing or reduced to writing within

thirty days of the “date the order of sentence is entered.” Tenn. R. Crim. P. 33(b). This provision is mandatory, and the time for the filing cannot be extended. Tenn. R. Crim. P. 45(b); State v. Martin, 940 S.W.2d 567, 569 (Tenn. 1997). Because a trial court does not have jurisdiction to hear and determine the merits of an untimely motion for new trial, the trial court’s “erroneous consideration [and] ruling on a motion for new trial not timely filed . . . does not validate the motion.” Martin, 940 S.W.2d at 569 (citing State v. Dodson, 780 S.W.2d 778, 780 (Tenn. Crim. App. 1989)). An untimely motion for new trial “not only results in the appellant losing the right to have a hearing on the motion, but it also deprives the appellant of the opportunity to argue on appeal any issues that were or should have been presented in the motion for new trial.” Id.

On appeal, the appellant admits that he “was six days late in filing his motion for new trial.” However, he asks this court to waive the timely filing of the motion for new trial. This court has previously cautioned, “Unlike the untimely filing of the notice of appeal, this court does not have the authority to waive the untimely filing of a motion for new trial.” State v. Patterson, 966 S.W.2d 435, 440 (Tenn. Crim. App. 1997); see also State v. Givhan, 616 S.W.2d 612, 613 (Tenn. Crim. App. 1980) (stating that neither the trial court nor this court has the jurisdiction to extend the time available for filing a motion for new trial). We note that despite an untimely motion for new trial, this court may review sufficiency of the evidence and sentencing. State v. Boxley, 76 S.W.3d 381, 390 (Tenn. Crim. App. 2001). However, the appellant did not raise those issues in his appellate brief.

Regardless of waiver, this court may address the appellant’s issues if they fall under the doctrine of plain error. Plain error is “[a]n error which has affected the substantial rights of an accused . . . at any time, even though not raised in the motion for a new trial . . . where necessary to do substantial justice.” Tenn. R. Crim. P. 52(b); see also Tenn. R. Evid. 103(d). We may only consider an issue as plain error when all five of the following factors are met:

- (a) the record must clearly establish what occurred in the trial court;
- (b) a clear and unequivocal rule of law must have been breached; (c)
- a substantial right of the accused must have been adversely affected;
- (d) the accused did not waive the issue for tactical reasons; and (e)
- consideration of the error is “necessary to do substantial justice.”

State v. Adkisson, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994) (footnotes omitted); see also State v. Smith, 24 S.W.3d 274, 283 (Tenn. 2000) (adopting the Adkisson test for determining plain error). Furthermore, the ““plain error” must be of such a great magnitude that it probably changed the outcome of the trial.” Adkisson, 899 S.W.2d at 642 (quoting United States v. Kerley, 838 F.2d 932, 937 (7th Cir. 1988)).

From our review of the record, we conclude that the appellant’s claims do not constitute plain error. Based upon the uncontroverted evidence against the appellant, we cannot conclude that the potential errors undermined the fairness or influenced the outcome of the trial. Accordingly, the appellant is not entitled to relief.

III. Conclusion

Based upon the foregoing, we affirm the judgments of the trial court.

NORMA McGEE OGLE, JUDGE